BOARD OF ALIEN LABOR CERTIFICATION APPEALS
800 K St., N.W.
WASHINGTON, D.C. 20001-8002

Date: December 22, 1998
Case Nos: 98-INA-0135

In the Matter of:

MARTIN E. DOLENCE, JR., P.A.
Employer

On Behalf of:

BRIGITTE C.W. TESSNER
Alien

Appearance: Wayne M. Levine, Esq.
for the Employer and the Alien

Certifying Officer: Floyd Goodman
Atlanta, Georgia

Before: Holmes, Vittone and Wood
Administrative Law Judges

JOHN C. HOLMES
Administrative Law Judge

DECISION AND ORDER

This case arose from an application for labor certification on behalf of alien, Brigitte C.W. Tressner ("Alien") filed by Employer Martin E. Dolence, Jr. P.A.. ("Employer") pursuant to 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. 1182(a)(5)(A)(the "Act"), and the regulations promulgated thereunder, 20 CFR Part 756. The Certifying Officer ("CO") of the U.S. Department of Labor, Atlanta, Georgia denied the application, and the Employer and Alien requested review pursuant to 20 CFR 656.26.

Under 212(a)(5) of the act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor ("Secretary") has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified and available at the time of the application and at the place where the alien is to perform such labor; and, (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed.

Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have

been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other means in order to make a good faith test of U.S. worker availability.

The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File ("AF"), and any written arguments of the parties.

STATEMENT OF THE CASE

On May 16, 1996, the Employer filed an application for labor certification to enable the Alien to fill the position of Secretary in Employer's Certified Public Accounting firm.

The duties of the job offered were described as follows:

"Take dictation in shorthand, own notes, or recording device and transcribe on typewriter or computer. Screen calls and visitors, open and route mail, compile and type statistical reports, compose routine correspondence, maintain files, and perform related clerical duties."

Educational requirement was high school graduate or equivalent; two years job experience, or in the related occupation of medical secretary. Special requirements were: Type 50 WPM. Wages were $301.15 per week. Report to President (AF-36-54)

On January 16, 1997, the CO issued a NOF proposing to deny certification. The CO alleged that employer may have violated 20 C.F.R. 656.21(b)(6) and/or 656.24(2)(ii) in that he may have rejected qualified U.S. applicants, specifically, Carolyn A. Albert. In a follow up questionnaire, Ms. Albert stated that she was disqualified based on a typing test which required a typing speed of 50 wpm. She misspelled one word along with several spacing errors, and was disqualified. Additionally, the test was not administered fairly. The CO determined that the testing was not done in good faith. "Rejection based on failure of a typing test not discussed in person with the applicant, and most certainly not signed by the applicant taking the test is not a lawful job-related reason; especially since a copy of the alien's typing test was not provided." Corrective action would be documentation that "...Ms. Albert did not meet the minimum job requirements of the Secretarial position as written. It must also explain who the Secretary was that gave Ms. Albert the typing test; why this applicant's test score [was] not discussed with her at the time of interview, and why she was not allowed to sign her typing test. Also explain whether-or-not the alien was also administered the same test before being hired, and if so, why did the employer not provide a copy of the alien's test score?" (AF-19-23)

Employer, February 10, 1997, forwarded its rebuttal, stating in an affidavit signed by its President, that while he signed the typing test result, he did not administer it, but rather had that done by Judy A. Reif. Applicant Alberts' typing test results showed only 43 words per minute with one misspelling and 12 spacing errors. Alien had been given a score of 52 words per minute which included nine errors over a five minute period. Copies of both tests were included, signed by President, Martin E. Dolence, Jr., with the date, time and place of the test. Mr. Dolence further averred that the tests are always administered in the same manner using basic language. (AF-13-18).

On September 5, 1997, the CO issued a Final Determination denying certification. She contended that Employer had not engaged in a good faith recruitment effort. Specifically, the CO found Mr. Dolence "..has admitted to not only signing his name to a typing test that he didn't give, but also to not allowing the U.S. applicant to sign her name to the test that she supposedly took. To discuss 'the only' U.S. applicant's typing test over-the-telephone a week after the test was given, and then being told your test scores 'over-the-'phone and not in person' is not showing a good-faith recruitment effort. There is no way of knowing whose typing tests the employer submitted to the Certifying Officer, since neither the employer placed his signature next to his typed-in name; and he was not even the one who administered the typing tests." (AF-12,12a)

On October 9, 1997, Employer filed a request for review of the Final Determination. (AF-1-11)

DISCUSSION

Section 656.25(e) provides that the Employer's rebuttal evidence must rebut all the findings of the NOF, and that all findings not rebutted shall be deemed admitted. Our Lady of Guadalupe School, 88-INA-313 (1989); Belha Corp., 88-INA-24 (1989)(en banc). Failure to address a deficiency noted in the NOF supports a denial of labor certification. Reliable Mortgage Consultants, 92-INA-321 (Aug. 4, 1993).

The Board has held that an applicant is to be considered qualified for a job if he or she meets the minimum requirements specified for that job in the labor certification application. United Parcel Service, 90-INA-90 (Mar. 28, 1991). Moreover, the Board has held that an employer unlawfully rejects a U.S. worker who satisfies the minimum requirements specified on the ETA 750A and in the advertisement for the position. Sterik Co., 93-INA-252 (Apr. 19, 1994); American Cafe, 90-INA-26 (Jan. 24, 1991). An employer may reject a U.S. applicant who fails a test or questionnaire designed to determine whether the applicant has the proper experience for the job. MITCO, 90-INA-295(Sept.11, 1991).

Although the regulations do not explicitly state a "good faith" requirement in regard to post-filing recruitment, such a

good-faith requirement is implicit. H.C. LaMarche Enterprises, Inc., 87-INA-607 (Oct.27, 1988). An employer must take steps to ensure that it has rejected U.S. applicants only for lawful, job-related reasons, and actions by the employer which indicate a lack of good faith recruitment effort, or actions which prevent qualified U.S. workers from pursuing their applications, are a basis for denying certification. In such circumstances, the employer has not proven that there are not sufficient U.S. applicants who are "able, willing, qualified and available" to perform the work. 20 C.F.R. 656.1. See, also, 20 C.F.R. 656.21(b)(6) (workers applying for a job opportunity offered to an alien may be rejected solely for lawful, job-related reasons); 656.20(c)(8)(the job opportunity be clearly open to any qualified U.S. workers).

The CO has not found that the test required for typing 50 wpm is itself unfair or a legitimate requirement for the job opportunity of secretary. Rather, she found Employer in this case had not demonstrated a good faith administration of the test. While we do not take Employer's affidavit lightly, we note that in this case all evidentiary matter with respect to the test given is within the hands of Employer, and that the test administered can be so easily duplicated as to invite future fraudulent administration in labor certification cases were Employer's arguments upheld. More than an assertion to that effect may be required in labor certification cases to demonstrate that a pre-employment test is administered fairly. Employer, could, for example, have had applicant Albert sign the test to attest to its authenticity. Moreover, the CO specifically addressed this issue in the NOF stating: "Rejection based on failure of a typing test not discussed in person with the applicant, and most certainly not signed by the applicant taking the test is not a lawful job-related reason.." Employer was thus given the opportunity in rebuttal to request a retesting or other form of demonstrating that applicant Albert did not have sufficient typing skills. In that connection, Ms. Albert had alleged a test result of 61 wpm with one error in a test administered by a telephone company and had informed the Florida Job Service and presumably Employer of same. (AF-40).

While not directly cited by the CO, moreover, we find that the Employer's rebuttal indicated that the typing test was not administered and evaluated in a fair manner and therefore the Employer has failed to engage in a good faith effort to recruit. In this regard, the Alien typed 269 words and made 9 errors. The test was scored by deducting the 9 errors from the 269, and then dividing by 5 minutes, for a score of 52 (AF-16). Applicant Alberts typed 215 words. If her test were scored in the same manner as the Alien, she would have 215 words, minus 12 errors (assuming inclusion of spacing errors), divided by 5 for a score of 40.6. Instead the 215 words were divided by 5 and **then** the 12 errors were subtracted, resulting in a score of 31. (AF-17). If the Alien's test had been scored in the same manner, her result would be 269 words divided by 5 (53.8) which would result in a

score of 44.8 after the nine errors were subtracted. In other words, if the Alien's test were scored in the same manner as the applicant's, she would not have qualified for the opportunity. Since Employer has not carried its burden of good faith recruitment, but indeed, has shown bad faith,, its application for labor certification must be denied.

ORDER

The Certifying Officer's denial of labor certification is AFFIRMED.

For the Panel:

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JOHN C. HOLMES
Administrative Law Judge

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I respectfully dissent. In order to show a business necessity Employer must show that the requirement bears a reasonable relationship to the occupation in the context of the employer's business and that the requirement is essential to performing in a reasonable manner the job duties as described by the Employer. Information Industries, Inc.,88-INA-82(Feb.9, 1989)(en banc). I believe Employer has met that standard. I'm impressed by the fact that Employer in describing the 50 mile "commute" is merely describing what takes place in his business. While Employer's mere statement that this is a usual practice in the industry need not be taken at full value, nevertheless, alien's job with Employer does in fact cause him to make such commute. I assume that Employer uses good business methods and would not require an unnecessary loss of time in travel were it not essential for the business. Moreover, it makes sense to locate a warehouse in less expensive New Jersey, with the retail outlet in congested, shopping mecca in New York City. Employer has gone to great lengths to explain his business and to provide the necessary information to the CO on this issue. The requirement was not tailored to meet any specific experience of alien or to set up a discouragement for U.S. workers. The documentation requirement of an hour by hour breakdown of the job duties is not a basis for

denial of certification since, in light of Employer's explanations, the job varies from day to day, but requires substantial commuting. I believe the Employer has met the test of obtaining reasonable documentation set out in Gencorp., 87-INA-659(January 13, 1988)(en banc).

Similarly, the CO's basis for denial based on failing to offer the job on the same conditions that it was offered to the alien is not persuasive. As set out at length by Employer, alien's past experience was similar to his current job with Employer. I quote at length from Employer's rebuttal (AF-90):"It is our position that a minimum of two years experience is an absolute business necessity for this job. The reason for this is that without such experience one simply does not possess the knowledge and coordination of inventory/shipping/receiving systems. In the instant case we did not train Mr. Torres as he worked for some two years as a supervisor at Just Packaging during which he performed the same sort of supervision skills in the direction and processing of inventory (products brought in for shipment), shipping (carrier selection, records, follow up) and receiving (intake of items to be shipped with necessary records and inventory input/stocking). Our business is more commercial but nevertheless involves that same functions as the majority of our shipping is in fulfillment of our catalog orders to individual customers and the receiving/inventory is larger and more involved in terms of coordination and control but does not utilize the same skills that Mr. Torres acquired at Just Packaging. In fact the experience at a facility like Just Packaging is actually very good as such operations survive on the ability to turn around a product receipt, short term inventory and shipment coordination on a rapid high volume basis. Mr. Torres was not a packer at Just Packaging but did supervise some 15 people in this receiving/inventory/shipping function. These skills are a "commodity" of sorts and are transferable to a wide variety of merchandise. At Just Packaging Mr. Torres dealt with whatever product was being processed. In our business we deal with ready to wear, although the skills are the same and it is not necessary to be limited to backroom operation of clothing or luggage. Should you feel that the ETA7-50A should be modified at item 14 for related experience we shall be happy to do such; although do not see the distinction in job skills."

I have quoted at length to indicate the apparent good faith and knowledge of the business by Employer, as well as the fact that alien had had prior experience in the job opportunity, albeit in a different industry. I might have preferred that the CO had taken up Employer's offer to readvertise, and perhaps on a wider basis, including a New York newspaper. However, while the CO had earlier contended the New York Times should also be used for advertising, she had not given failure to do so as a reason for proposed denial in the NOF. Employer thus was not given an opportunity to rebut or remedy the issue through advertising

Finally, I agree that Employer did not document the annual

volume of business as directed because "principals do not permit such disclosure." Even in today's litigious society, a stronger basis should have been given by Employer for refusing to make such information available were it necessary to the determination of this matter. Employer, however, has documented the number of employees in the company their location and the nature of most of their duties. The additional information requested for documentation and refused is of little, if any, value in the determination of the issues raised by the CO, and its revelation would be irrelevant to this determination. The CO has not given a valid reason why such requested documentation was necessary.

As stated *supra* while I could have preferred a better testing of the U.S. market and remain unconvinced that there are not U.S. Stock Supervisors available and willing to work for the wages offered in the New York City area, the CO has not given valid reasons for denial of certification. Stated differently, Employer has made a good faith effort to test the U.S. job market and has responded satisfactorily in documenting the matters requested by the CO concerning the issues on which certification was denied. I would remand for granting of certification.

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JOHN C. HOLMES
Administrative Law Judge